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In The

Supreme Court of the United States

October Term, 1993

BRIAN CASHIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Supreme Court for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court commit error when it refused to grant the motion for new trial of Defendant, Brian Cashin, or at the very least require jurors, Patricia McNally and/or Patricia White to testify at a post-trial hearing to determine whether any impropriety occurred.

2. Did the trial court commit reversible error in permitting government informant, Steven Zavorski, to testify to conversations he overheard between Defendant and co-Defendant, Barry Cashin, in the holding cell during the course of Defendant's trial.

3. Did the trial court improperly calculate the offense level of the Defendant pursuant to the Federal Sentencing Guidelines.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Brian Cashin, respectfully prays that a Writ of Certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 9, 1993 .

OPINIONS BELOW

On April 9, 1993, the United States Court of Appeals for the Sixth Circuit issued an opinion affirming the judgment of the District Court, *United States of America v. Brian Cashin,* (No. 91-2303) (6th Cir. 1993) which is appended as Appendix A.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 9, 1993, and this Petition is being filed within 90 days of the date as required by Rule 13.1 of the Supreme Court Rules. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

FEDERAL RULES OF EVIDENCE

Rule 606. Competency of Juror as Witness

(a) **At the trial**. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) **Inquiry into validity of verdict or indictment**. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly

brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

STATEMENT OF THE CASE

Brian Cashin, hereinafter referred to as the Defendant was originally charged in a criminal complaint and then in an indictment with the charge of conspiracy to tamper with a witness in violation of 18 U.S.C. § 317, and attempted witness tampering in violation of 18 U.S.C. § 1512(b). He was charged in the Indictment with his brother and co-Defendant, Barry Cashin, and a further Amended Indictment was filed adding a Count III only applicable to co-Defendant, Barry Cashin, charging him with the additional crime of soliciting another person to murder an FBI agent.

The trial commenced March 11, 1991, with jury selection and opening statements having been made on behalf of the Government.

During the voir dire process the court inquired as to whether any of the potential jurors "are acquainted with or related to or think you may be acquainted with any of the people whose names you heard read here and that includes Mr. Barry Cashin and Mr. Brian Cashin who were introduced as the Defendants in this case . . ." At no time did Patricia White who was ultimately selected as a juror in this case indicate any knowledge or awareness of co-Defendant, Barry Cashin. The court further inquired of all potential jurors if they knew of any reason why they could not sit as a fair and impartial juror in the case. Neither of the co-Defendants used all of their preemptory challenges in selecting a jury, and Patricia White was impaneled to hear the case to its conclusion.

Co-Defendant, Barry Cashin, had been previously indicted on a conspiracy to distribute marijuana charge and was incarcerated in the Bay County Jail during the period of time that gives rise to this case against his brother, Brian Cashin, Defendant herein.

FBI Agent, Al DiBrito, was the case agent on co-Defendant, Barry Cashin's drug case as well as the seizure of certain assets belonging to Barry Cashin. Agent DiBrito testified that Brian, Defendant herein, was handling these forfeiture matters for his brother Barry and that Agent DiBrito would have contact with Brian relative to these forfeiture matters .

Special Agent Welker of the FBI testified that near the conclusion of the Barry Cashin drug case, he received a telephone call from a Mr. Steven Zavorski who was incarcerated in the Bay County Jail with Barry Cashin. Mr. Zavorski related to him that Barry Cashin was interested in intimidating certain potential witnesses in his drug case and Agent Welker responded by telling Mr. Zavorski to play along with Barry Cashin and glean whatever information he could through conversations with him. Mr. Zavorski testified at trial that during the month of November, 1990, while incarcerated in the Bay County Jail he was in the same cellblock with Barry Cashin and they had a number of conversations relative to Barry Cashin's pending drug case.

In direct examination Zavorski testified that Barry Cashin approached him to locate witnesses Bob Vodicka, Rod Croton and Terry Marshall, in return for the sum of $500. After this contact with co-Defendant, Barry Cashin, Mr. Zavorski was transferred from the Bay County Jail to the Cotton Facility at Jackson Prison and the money was sent to him by Brian Cashin, Defendant, by way of a money order.

Mr. Zavorski subsequently returned from the Cotton Facility back to the Bay County Jail and had further conversations with co-

Defendant, Barry Cashin, with reference to having Federal Agent Al DiBrito killed. It was as a result of this conversation that Mr. Zavorski contacted Agent Welker. In order to obtain the evidence against co-Defendant, Barry Cashin, Mr. Zavorski agreed to wear a body wire in the Bay County Jail in order to tape conversations he would have with Barry Cashin with reference to all the matters Mr. Zavorski had discussed with him. Mr. Zavorski further stated that he had arranged for the payment of $1,000 to a person working on behalf of the federal government outside of the Bay County Jail to accomplish a number of things that the co-Defendant, Barry Cashin, desired to have done but none of them included the intimidation of any witnesses.

As part of their investigation in this matter, the FBI enlisted the aid of Lieutenant Michael Winters of the Michigan State Police and requested that he meet with Brian Cashin under the guise of being the individual working on the outside on behalf of Mr. Steven Zavorski. Lieutenant Winters testified that he placed a telephone call to Brian Cashin in an attempt to arrange a meeting with him. Lieutenant Winters met with Brian Cashin at a parking lot at Mr. Cashin's place of employment on November 27, 1991, and the conversation between the two was recorded by a body wire. During that meeting, Defendant Brian Cashin gave to Lieutenant Winters $1,000 in cash. During the taped conversation, Defendant Brian Cashin referred to attempting to locate a Terry Marshall who was not a witness in the drug case against Barry Cashin.

When Brian Cashin testified he indicated that his brother, co-Defendant Barry Cashin, requested the hiring of a private investigator and he believed that Lieutenant Winters was indeed a private investigator.

Co-Defendant Barry Cashin testified on his own behalf in this case and, essentially stated that he was afraid of Steven Zavorski and that Mr. Zavorski threatened him and forced him to make the

recorded statements. He further testified that the initial money sent to Mr. Zavorski while he was at the Cotton Facility was to have someone who had access to FBI manuals to determine whether money seized from him during his drug case could be disposed of prior to trial in this matter. He requested of his brother, Brian Cashin, Defendant, to mail this money to Mr. Zavorski in order to pay Zavorski for his efforts in this respect.

Barry Cashin called a number of witnesses from the Bay County Jail who essentially indicated that they heard threats from Mr. Zavorski toward Barry Cashin and the fact that Mr. Zavorski had apparently made sexual motions towards Barry Cashin.

Brian Cashin presented a number of witnesses in his defense which essentially consisted of the fact that he was transferring $1,000 to Lieutenant Winters in order to hire a private investigator on behalf of his brother, co-Defendant Barry Cashin. The last time that Brian Cashin had visited his brother at the Bay County Jail, Barry Cashin had clearly indicated to him that someone would be contacting him with reference to hiring a private investigator to locate Terry Marshall. This was precisely the reason for the meeting with Lieutenant Winters on November 27, 1991. He further testified to mailing Steven Zavorski over the course of a few weeks the sum of $450, and it was his belief that this money was for information on FBI procedures relative to the money which had been seized from his brother.

The wife of Defendant Brian Cashin also testified that she was involved in the sending of $450 to Steven Zavorski at the Cotton Facility. Both she and her mother-in-law, Bernice Cashin, testified that they were aware that a private investigator was to be hired by Barry Cashin in order to find out the involvement of Terry Marshall in Barry Cashin's drug case.

The testimoney was further corroborated by Pamela

Anderson, a co-worker of Brian Cashin. She testified that she was aware prior to November 15, or November 16, 1990, that the Cashin family was endeavoring to hire a private investigator on behalf of co-Defendant, Barry Cashin .

The credibility of Government witness, Steven Zavorski, was absolutely crucial to the case in this matter, not only because it was Mr. Zavorski's word against that of Barry and Brian Cashin, but also because he testified that during one of the morning recesses in the trial, co-Defendant Barry Cashin, and Defendant Brian Cashin were taken to a holding cell in the federal building which was immediately next to his. Mr. Zavorski had been placed in the holding cell next to the Cashins prior to their arrival at the holding facility, and he was being held there pending his testimony in the matter scheduled for that particular day. Mr. Zavorski had been informed prior to his arrival at the holding cell that he was to sit there and not let anyone know that he was present. Once the Cashins arrived at the holding facility, Mr. Zavorski sat out of sight so that he could not be seen by the Cashins and did not say anything that would identify the presence of any other individual.

After their arrival, co-Defendant Barry Cashin requested that the door be closed to the office of the Marshalls so that he could have some privacy. Mr. Zavorski then related a conversation which he overheard between Barry Cashin and Brian Cashin essentially indicating that Brian was worried as to whether the jury knew what the money was used for, and Barry responded that everything would be okay as long as Brian stuck to his private investigator story.

Co-Defendant Barry Cashin testified outside the presence of the jury that when he was brought up to the holding cell from a break in the trial, he expected privacy within the confines of that cell and that he did not know that anyone else was present at that time. If he had known that Mr. Zavorski was in the cell next to him

he would not have said anything. Likewise, Defendant Brian Cashin also testified that he was unaware of the presence of Mr. Zavorski or anyone else and at that time any conversations were engaged in between his brother and him he expected such conversations to be totally private.

Both Defendant Brian Cashin and his co-Defendant Barry Cashin were convicted of Counts I and II of the Amended Indictment by the jury in this matter.

Both of the Defendants in this matter filed a motion for a new trial which were heard by the court on September 18, 1991. Accompanying the motion for a new trial of Defendant Brian Cashin, was an affidavit signed by Deborah Cashin indicating that she had talked to a juror sitting on her husband's case by the name of Patricia McNally. The affidavit of Deborah Cashin raised a number of improprieties which occurred during the jury deliberation in this matter. The most important of these is that a fellow juror, Patricia White, had indicated that she knew where Barry Cashin lived and she had known that he had been a big-time drug dealer for 15 years.

The motions were heard before the Hon. Robert H. Cleland on September 18, 1991, and the court denied the motions and would not even allow the testimony of any juror as to what extrinsic or other information Patricia White brought to the jury room during the course of deliberations .

Brian Cashin was sentenced upon the jury verdict in this matter on October 14, 1991. During the sentencing procedure Judge Cleland would not allow Defendant Brian Cashin to contest the base offense level being used in order to determine an appropriate sentence for him. The court found that under the Sentencing Guidelines it had to use the base offense level of Barry Cashin even though the Barry Cashin drug case was under appeal for that exact issue.

The court additionally assessed 2 points for obstruction of justice and 2 points for Barry Cashin's possession of a gun in his drug case stating that Defendant Brian Cashin should have reasonably known that Barry, his brother, had a gun during the commission of his drug offense. Judge Cleland sentenced Defendant Brian Cashin within the Guidelines as he determined them to be and gave him 60 months on Count I and 84 months on Count II to run concurrently with Count I.

This matter was appealed to the Court of Appeals for the Sixth Circuit and in its opinion issued April 9, 1993, denied all of the appellate issues raised by Defendant Brian Cashin. The Sixth Circuit in reliance on *Brofford v. Marshall*, 751 F.2d 845 (6th Cir. 1985) found that juror White's knowledge of co-Defendant Barry Cashin's drug dealing was not prejudicial. They further went on to find that it was not error for the district court to refuse to allow juror White or juror McNally to testify as to what if any information was given to the jury in the course of its deliberations relative to juror White's knowledge of co-Defendant Barry Cashin.

The Sixth Circuit Court of Appeals also found that there was no error in allowing Steven Zavorski to testify as to the holding cell conversations of Barry and Brian Cashin inasmuch as there is no Sixth Amendment right that was violated and further that conversations of the two Defendants on trial were not hearsay.

Lastly, the Court of Appeals also found that the two-level enhancement for Defendant as a result of Barry Cashin's possession of a weapon was not in error inasmuch as they would not disturb the sentencing court's decision in this respect unless it was clearly erroneous citing *United States v. Marino*, 899 F.2d 465 (6th Cir. 1990). The Court of Appeals appeared to erroneously rely upon the close relationship between Brian and Barry Cashin that they believed had been brought out during the course of the trial in this matter. Defendant Brian Cashin believes that all three of these

rulings by the Sixth Circuit Court of Appeals are erroneous and therefore the granting of the Petition for Writ of Certiorari to the United States Supreme Court is appropriate.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT COMMITTED ERROR WHEN IT REFUSED TO GRANT THE MOTION FOR NEW TRIAL OF DEFENDANT, BRIAN CASHIN, OR AT THE VERY LEAST REQUIRE JURORS, PATRICIA MCNALLY AND/OR PATRICIA WHITE TO TESTIFY AT A POST-TRIAL HEARING TO DETERMINE WHETHER ANY IMPROPRIETY OCCURRED.

After his conviction on Counts I and II, Defendant Brian Cashin had filed a motion for a new trial and amended motion for a new trial attached as Appendix B. In the original filing of the motion for new trial, an affidavit of Deborah Cashin, Defendant's wife, was attached. The affidavit had indicated that she had talked to a juror, Patricia McNally, about the case just a few days after the jury verdict had been rendered. The affidavit set forth the fact that a fellow juror, Patricia White, had informed juror McNally that juror White knew where co-Defendant Barry Cashin lived and knew him as a "big-time drug dealer in Midland for at least 15 years . . . "

Juror McNally went on to indicate that during jury deliberations "most jurors thought the Government's key witness, Steven Zavorski, was a liar but since Barry Cashin was a big-time drug dealer he must be a worse individual and therefore they chose not to believe Barry Cashin . . ."

The court conducted a hearing on these motions on September 18, 1991. In order to present evidence relative to exactly what juror

Patricia White had said, counsel for Defendant Brian Cashin had subpoenaed juror McNally to appear at said hearing. However, the day prior to the hearing counsel for Brian Cashin was informed by the court that it would not permit the testimony of Juror McNally. During the course of the motion, Defendant's wife, Deborah Cashin, testified that she had talked to juror McNally on the phone for at least one hour and 38 minutes and juror McNally did most of the talking during this period of time. She could not relate the entire conversation; however, it is apparent that Deborah Cashin came to the conclusion that juror White was familiar with co-Defendant Barry Cashin and considered him a big-time drug dealer for at least 15 years in the Midland area.

In its oral opinion denying the motion for a new trial, the court found that the information given to juror McNally by juror Patricia White was indeed extraneous evidence but ruled that it was not prejudicial and, therefore, denied the Defendant's motion for a new trial.

The Defendant appealed this ruling to the Sixth Circuit Court of Appeals which affirmed the trial court's decision, however never apparently ruled directly on the issue that was raised by the Defendant in his appeal. The Sixth Circuit initially rationalized that pursuant to Federal Rules of Evidence 606(b), that neither juror McNally nor White nor any other members of the jury could testify or give any evidence concerning anything that might have influenced their deliberative process in reaching a verdict in this matter.

The Sixth Circuit went on to indicate that the trial court's analysis as to whether the information juror White relayed to juror McNally was extraneous prejudicial information was an incorrect analysis under Rule 606(b). The Court of Appeals found that if there was any failure to disclose any information by jurors during voir dire examination, that the analysis that should take place

should not be under Rule 606(b) but under the caselaw of *Brofford v. Marshall, supra.*

The Court of Appeals found that it was totally discretionary that the trial court have juror White subpoenaed to testify as to whether she deliberately or inadvertently misstated her knowledge of Barry Cashin during the voir dire process. Defendant believes that while analysis under *Brofford v. Marshall, supra,* may be necessary in a determination as to whether a motion for new trial shall be granted, it is not the sole analysis that should take place.

The Court of Appeals should have also analyzed this matter under the confines of Federal Rule of Evidence 606(b) where a juror may testify as to whether any extraneous prejudicial information was improperly brought to a jury's attention during the course of their deliberations. It should be noted that *Brofford v. Marshall, supra*, is an entirely different factual setting than what we have here involving this Defendant, and the Court of Appeals failed to recognize any distinguishing features between these two cases. In *Brofford, supra,* a juror indicated that she had received pretrial publicity on the case and she had preconceived notions as to defendant's guilt prior to the commencement of the trial. She indicated that during voir dire that she could set aside this preconceived notion and based her verdict on the facts; however, she subsequently recanted in the unnotarized statement indicating that she was not able to do so during the deliberative process.

The Sixth Circuit in *Brofford, supra*, stressed that the statement signed by the juror was not notarized and further stated that it was attempting to analyze whether the juror lied when she indicated that she could set aside her preconceived notions or not. The Sixth Circuit in *Brofford, supra,* rationalized that rather than having committed perjury in voir dire, that she simply was not able to put aside her preconceived notions, and the fact that she stated she was prejudiced by these preconceived notions was

incompetent testimony regarding the effect of this upon her mind or emotions.

That is not the situation we have here in this matter. In this particular case both co-Defendant Barry Cashin and the Defendant had preemptory challenges left and could have removed juror Patricia White from sitting on a jury had they known that she had knowledge of Barry Cashin's criminal background.

Patricia White, as all the jurors were, was specifically asked as to whether she was familiar with either of the Defendants in this particular case and she never indicated at any time that she was aware of Barry Cashin, aware of him as a drug dealer, or even aware that he lived in the city of Midland. This extraneous information was then brought to the attention of the other jurors, which is not the situation in *Brofford v. Marshall, supra.*

A proper analysis should also be under Federal Rule of Evidence 606(b). In fact, the Sixth Circuit indicated that the trial judge's analysis was incorrect in determining whether Rule 606(b) was applicable or not since this case had to be analyzed under *Brofford v. Marshall, supra.* It is the Defendant's contention that not only is *Brofford v. Marshall, supra,* controlling here, but also an analysis under Rule 606(b) is required.

In analyzing the case under Rule 606(b), it is necessary to realize that it is absolutely essential that the constitutional guarantee of a trial by jury requires that the jury verdict be based upon evidence produced at trial. *Turner v. State of Louisiana*, 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). This requirement "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury", *Turner v. Louisiana,* 379 U.S. 472. Consequently, any extraneous evidence which enters into the jurors' deliberations threatens all of defendant's constitutional safeguards attendant at any jury trial.

Judge Cleland found that there was extraneous evidence introduced into the jury deliberations. His only difficulty with granting the motion for a new trial was the fact that it was not prejudicial. At no time did he ever conduct a hearing as to determine what, if anything, juror White actually said to juror McNally during the first day of deliberations by the jury. It is interesting to note that Defendant's wife, Deborah Cashin, had a one hour and 38 minute conversation with juror McNally who did most of the talking, and it was impossible for her to remember at the motion for a new trial in this matter the sum and substance of everything that had been discussed. Consequently, it is the belief of the Defendant that at the very least juror McNally and/or juror White should have been subpoenaed to determine exactly what was said, not to determine whether the jury was unfairly influenced, but to determine whether there was extraneous evidence introduced in the jury deliberations which the court could then determine once it had full knowledge of this evidence whether it was prejudicial or not. Judge Cleland even one day before the hearing in this matter notified counsel for the Defendant that he would not permit a juror to testify, *i.e.* he had his mind made up at that time.

The Court of Appeals' attempts to negate the importance of this extraneous evidence by indicating that the majority of what is contained in Deborah Cashin's affidavit was brought out during the course of the trial. The only evidence produced at the trial was the fact that Mr. Barry Cashin had made a substantial sum of money selling marijuana prior to his previous arrest on an income tax evasion charge in 1985. There was an intimation by counsel for the Government that he was a big-time drug dealer; however, this does not relate back 15 years as juror White indicated in her conversations with juror McNally.

It should be remembered that Barry Cashin testified on behalf of his brother, Brian, that Brian was unaware of any of the

conversations between Barry Cashin and Steven Zavorski. Essentially, the case came down to a question as to whom to believe. On the one hand, Steven Zavorski, the informant on behalf of the United States Government, or on the other hand Barry Cashin and his brother, Brian Cashin.

In light of the information relayed to at least juror McNally, and perhaps other jurors from juror Patricia White, as to the background of Barry Cashin, such extraneous information severely questions the credibility of Barry Cashin which was a key to Defendant Brian Cashin's case.

The Eleventh Circuit found in *United States v. Heller,* 785 F.2d 1524 (11th Cir. 1986) that jury misconduct in the form of racial and religious slurs should have resulted in a mistrial and the trial judge's failure to so order constituted reversible error. It is clear that the information Patricia White held was even more than a bias or racial prejudice.

In *United States v. Delaney,* 732 F.2d 639 (8th Cir. 1984), one juror had questioned a police officer as to whether a probationer was informed of the conditions of his probation. The Eighth Circuit found that the appropriate standard to be applied was that the "presumption of prejudice is not conclusive, but the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the defendant", at page 642. In this particular case the Government did not come close to meeting any burden of showing that the contact was harmless. In fact, the U.S. Attorney resisted strenuously any hearing to even allow the court to determine what information was, indeed, given to the jury.

There are numerous cases which have held that a jury's knowledge of extraneous evidence may result in a mistrial and/or a new trial for the defendant. What is particularly important in this case is the trial court's information they had received and what

effect, if any, it might have had upon their deliberations. In *United States v. Griffith,* 756 F.2d 1244 (6th Cir. 1985), the court indicated that the trial judge should try to make a determination as to whether the jury actually used the material and whether there was prejudice to the defendant. The only way that this can be done is to inquire of the individual jurors as to whether they obtained this information during their deliberations and what effect, if any, it had upon their verdict in the matter. Yet, the day before the hearing on the motion for new trial, Judge Cleland informed counsel for Defendant, Brian Cashin, that he would not permit any juror to testify. Clearly, he had made up his mind even prior to the hearing that he would not attempt to make the determination as required in *United States v. Griffith, supra.*

Such a procedure is, likewise, recommended in *United States v. Ianniello,* 866 F.2d 540 (2nd Cir. 1989). This is the precise type of relief requested by Defendant Brian Cashin in his motion for new trial and accompanying brief. There are a number of cases which are similar where a juror has relayed information to other jury members and in those particular instances the Trial Judge, rightfully, inquired of the jurors what information they had received and whether it had any prejudicial effect upon their deliberations.

In *United States v. Perkins*, 748 F.2d 1519 (11th Cir. 1984), a juror had indicated that he knew the Defendant and had served on some committee with the Defendant. Two of the jurors sent letters to the trial court informing the Judge of this and the trial judge rightfully conducted a post-trial hearing to determine what effect, if any, this had on the jury deliberations. The trial court found that the jury misconduct was not prejudicial enough to require a new trial, however, the Eleventh Circuit Court of Appeals disagreed and reversed and remanded the matter to the trial court.

In the *United States v. Blair,* 444 F. Supp. 1273 (D.C. 1978),

one juror indicated during deliberations that he knew a co-defendant of Mr. Blair's. The trial court conducted a limited inquiry to determine what exactly had occurred and whether this extrinsic evidence created a reasonable possibility of prejudice. The court found that even if the evidence came from a fellow juror rather than someone outside of the jury room, it could unduly prejudice a jury by bringing extrinsic facts into the jury deliberations and, therefore, granted a motion for new trial. Clearly, the avenues taken by the trial judges in *United States v. Perkins, supra*, and *United States v. Blair, supra*, is the appropriate action to be taken in situations such as this; however, not knowing exactly what transpired in the jury room, Judge Cleland found in this matter that the extraneous evidence obtained by the jury was not prejudicial and would not even allow a juror to testify.

Defendant Brian Cashin is entitled to learn what extraneous information was brought up during the jurors' deliberations in this matter and to have a court fairly determine whether there was a possibility that a jury was unduly prejudiced by this information. The only way this can occur is if juror White and/or juror McNally are permitted to testify as to exactly what was said by juror White during the jury's deliberations. Both the trial court in its denial of motion for a new trial and the Court of Appeals in its decision premised upon *Brofford v. Marshall, supra*, have denied the Defendant this right which the Defendant believes severely impinges upon his constitutional guarantee of a trial by jury.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING GOVERNMENT INFORMANT, STEVEN ZAVORSKI, TO TESTIFY TO CONVERSATIONS HE OVERHEARD BETWEEN DEFENDANT AND CO-DEFENDANT, BARRY CASHIN, IN THE HOLDING CELL DURING THE COURSE OF DEFENDANT'S TRIAL.

On the morning of the second day of testimony, the U.S. Attorney informed the court that she intended to introduce during her continued examination of Steven Zavorski certain statements he overheard between Brian and Barry Cashin who were in the holding cell next to him the previous day. Counsel for Defendant Brian Cashin objected on the grounds that any statements made by Barry Cashin were hearsay and outside the conspiracy and therefore inadmissible.

The trial court ruled in that respect that a new conspiracy had begun and therefore it was admissible evidence in the initial conspiracy trial. Counsel also objected on the grounds that there was a Sixth Amendment right to counsel violation and on that issue the trial court found that there was no violation in that the expectation of privacy anticipated by both Defendants was not reasonable.

Prior to making these rulings the trial court took testimony from a number of witnesses including both Defendants, Steven Zavorski, and Federal Marshall Steve Kerkowski. The facts essentially showed that Steven Zavorski was a Government informant who had been promised assistance in state cases and possibly might have been paid as Mr. Poole had been for his participation and testimony in the trial. During the course of trial he had been brought up to the holding cell in the Federal Marshall's

office and told by Federal Marshall Steve Kerkowski to sit in his holding cell and not let the Cashins know that he was present. Zavorski further testified that the Defendants had no opportunity to see him or know that he was present, and at no time were the Defendants aware that he was in the holding cell next to him.

Both Defendants, Barry and Brian Cashin, testified that they were unaware of Mr. Zavorski's presence and they thought that they were in a secure area where they could carry on conversations relative to their trial proceedings. Federal Marshall Kerkowski corroborated this in testifying that he did not inform Barry or Brian Cashin that Mr. Zavorski was in the holding cell next to them when they were brought back to the Marshall's lockup during a break in their trial. He also testified that co-Defendant, Barry Cashin, had previously requested privacy by asking that the door be closed to the Marshall's office area so that he could have some privacy during the break in the trial.

Informant Zavorski testified that he overheard a conversation between Barry and Brian Cashin essentially indicating that Brian Cashin was worried as to whether the jury would believe his story as to what the $1,000 was paid for and Barry assured him that if he stuck with the informant story he would be all right.

The Sixth Circuit Court of Appeals agreed with the trial court and found that the statements of Barry and Brian Cashin were not hearsay and further that no Sixth Amendment right attached to the conversations that they conducted in the holding cell in the Federal Marshall's office. In reasoning that the statements were not hearsay under the Federal Rules of Evidence, the Sixth Circuit rationalized that they were not statements offered in evidence to prove the truth of the matter asserted but were only used to show that such statements were made. The Sixth Circuit stressed that the content of the statements was not significant. This is clearly contrary to the argument of counsel for the Government in rebuttal

closing argument wherein she indicated that, based upon the conversations in the lockup, Barry and Brian were concerned that there was some merit to the Government's case. She specifically indicated that they had knowledge of guilt based upon this and that they were fabricating a story to meet the evidence.

Clearly, the content of the conversations is what was important to the Government, not the fact that they were made contrary to the Sixth Circuit's analysis. The Sixth Circuit did not even attempt to validate the trial court's ruling on the hearsay objection wherein the trial court ruled that the statements were admissible because a new conspiracy had begun and, therefore, the evidence was admissible in the initial conspiracy trial. The Sixth Circuit's refusal to even consider this approach to permit the hearsay statements into evidence clearly shows that the trial court was erroneous in its ruling in this respect. The trial court ruling is contrary to *United States v. Howard*, 752 F.2d 220 (6th Cir. 1985).

Both the trial court and the Sixth Circuit Court of Appeals found that there was no Sixth Amendment right to counsel violation when Mr. Zavorski overheard the conversations of Barry and Brian Cashin. The Court of Appeals have relied primarily upon *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986) pointing out that a witness who merely happens to overhear incriminating statements is not engaging in any type of interrogation on behalf of the Government and, therefore, the right to counsel does not attach.

If the factual setting involving the Defendant in this case was the same as that in *Kuhlmann v. Wilson, supra*, there would be no argument that the rationale of that case is applicable. However, the Defendant's situation presents a case of first impression for this Court. In all other cases cited by either the Government, the Defendant, or the Sixth Circuit in its opinion, there was a face-to-face or telephonic confrontation between the Government

informant and the Defendant who was attempting to invoke his Sixth Amendment right. In this particular situation, there is no confrontation between the Defendant and Steven Zavorski. In fact, Brian Cashin did not even know of the existence of Steven Zavorski in the holding cell next to him. There is no difference between placing Mr. Zavorski in the holding cell next to Mr. Cashin than there is in placing a recording device in that holding cell.

Certainly both Barry and Brian Cashin expected some privacy when they requested that the door be closed to the Marshall's office. A federal agent specifically had told Mr. Zavorski that he was not supposed to say or do anything that would even allow the Cashins to know that he was present. Apparently, he did not even clear his throat or shuffle his feet since both Barry and Brian Cashin testified that they were not aware of his existence in the cell next door. It is interesting to note that the same federal agent did not advise the Cashins that there would be an individual in the cell next to them.

It must also be remembered that Steven Zavorski, the person who overheard these conversations, was a key Government informant in a defendant's case that was being litigated at that time. He was an informant who had been promised certain things and probably paid by the Government for his testimony. As previously indicated, this is a case of first impression. All of the other Sixth Amendment cases involved some kind of knowledge on the part of the defendant that he was conversing in the presence of another individual or to another individual.

The Sixth Circuit Court of Appeals rested its decision upon the fact that the Defendant was not being interrogated or questioned by the Government informant, and that based upon this there was no Sixth Amendment violation. The case that is most closely analogous to the Defendant's case is that of *United States v.*

Terzado-Madruga, 897 F.2d 1099 (11th Cir. 1990). In this particular case an informant recorded telephone conversations he had with the defendant not to elicit testimony relative to the case for which the defendant had already been indicted, but to gather information for contracts for murder, an entirely separate matter. The informant was specifically instructed not to discuss the pending drug case of the defendant; however, during the course of the tape recorded conversations, that subject was talked about between the Defendant and the informant.

In ruling that these incriminating statements were not admissible, the court stated at p. 1110 "because the Government deliberately created a situation likely to induce Terzado to make statements that he had a constitutional right not to make to their agent prior to consulting with Counsel . . . it is clear that Terzado's Sixth Amendment Rights were violated even though the agents had other legitimate reasons for listening to Defendant's conversations with its informant".

The same language can be analogized to the case at hand wherein the Government had legitimate reasons for Mr. Zavorski being in the cell next to the Cashins, however, it is the one who created a situation which likely caused Barry and Brian Cashin to make certain statements in the presence of Mr. Zavorski that could be then used against them at trial. The creation of this situation gave both Defendants a false sense of being able to converse in private about their proceedings which had just taken its morning recess.

The Court of Appeals rationalized that while the Government may have hoped that Mr. Zavorski would overhear any incriminating statements, he did not elicit any such remarks. Apparently, in *United States v. Terzado-Magruda, supra*, the Government informant did not elicit any remarks either; however, the situation and the atmosphere in which the informant was able to

overhear incriminating statements was created by the Government and, therefore, likewise these statements should not have been used during the course of the trial of the defendant, Brian Cashin.

III.

THE TRIAL COURT IMPROPERLY CALCULATED THE OFFENSE LEVEL OF THE DEFENDANT PURSUANT TO THE FEDERAL SENTENCING GUIDELINES.

Defendant Barry Cashin was sentenced to a term of incarceration on Count I of 60 months and on Count II a term of 84 months based upon an offense level of 28 and a guideline range of 78 to 97 months.

Prior to the sentencing the trial court issued tentative findings and indicated it would not allow the re-litigation of the issue as to the base offense level of the underlying offense that being the drug case of co-defendant Barry Cashin.

The court noted in its tentative findings that it would not relitigate that issue but it was subject to appellate review. One of the issues raised in Barry Cashin's prior drug sentencing hearing was that of an enhancement of two points for possession of a firearm for a hunting pistol that was found in proximity to the seized drugs. Likewise, during the sentencing of Brian Cashin, the court assessed him two points based upon the fact that the court found that Brian knew or reasonably should have known that Barry Cashin, his brother, possessed a dangerous weapon in connection with his drug-related activities. The two points were primarily assessed for the possession of a long-barrelled pistol that had a hunting scope on it. This pistol was located in a case and was unloaded. Additionally, a number of hunting rifles were also found throughout the basement area; however, all of these were also in cases.

During the sentencing of Barry Cashin, an expert, by way of affidavit, indicated that the handgun was a weapon designed for hunting. In order to assess two points for knowledge on behalf of Brian, it must be shown that Brian reasonably should have known that his brother possessed this weapon in connection with his original drug-related activities. The testimony at trial indicated that the brothers would hunt together and there was absolutely no testimony that Brian, the Defendant herein, was intertwined whatsoever in Barry Cashin's drug-related activities. In light of the fact that all of the weapons found at the home were hunting weapons, it is not reasonable to infer that Brian knew or should have known that the weapons located in the basement were related to his brother's drug activities. Clearly, the contrary is what was shown at the trial and the sentencing in this matter, *i.e.*, the weapons were used for hunting purposes not drug-related activities.

While marijuana was found in the basement area of Barry Cashin's home, there was no testimony that any of the weapons were found in the immediate vicinity of any of the marijuana. Additionally, the safe containing $300,000 of drug money was found underneath the stairs to which access was gained through a separate room in the basement. Absolutely no weapons were located in the area of the safe or even in the room from which access was made to the safe.

Lastly, there was no testimony at the sentencing hearing or the trial in this matter which would indicate that Brian Cashin had been in the basement in the recent time prior to his brother, Barry Cashin's arrest. Sue Ward, co-Defendant Barry Cashin's live-in girl friend, testified during the trial that Brian visited infrequently.

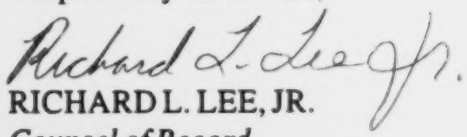
As a consequence the record is totally void of any reasonable articulated facts that Brian Cashin knew or should have known of the possession of any weapons by Barry Cashin in connection with

his drug business. On the contrary, all weapons were hunting weapons and, therefore, the two points should not have been assessed as was done by both the trial court and affirmed by the Sixth Circuit Court of Appeals.

CONCLUSION

THEREFORE, because the Sixth Circuit ruled incorrectly on all three issues and because the issues presented are in conflict with the opinions of the Sixth Circuit and other courts of appeals, and because one of the issues presents a case of first impression, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED APRIL 9, 1993

Nos. 91-2303/2329

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRIAN CASHIN (91-2303), BARRY CASHIN (91-2329),

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Michigan

Before: JONES and GUY, Circuit Judges; and LIVELY, Senior Circuit Judge.

PER CURIAM. Defendants, Barry Cashin and Brian Cashin, appeal their convictions for witness tampering and for conspiracy to engage in witness tampering. The Cashins both allege that the district court abused its discretion in denying their motions for a new trial, and that the court erred in admitting into evidence portions of a conversation between them that was overheard by a government witness. In addition, Barry Cashin asserts that the district court abused its discretion in refusing to subpoena all of the witnesses the defense requested to have testify at trial, and that the

court violated his constitutional right against self-incrimination in sentencing him to consecutive prison terms. Brian Cashin also claims that the district court committed reversible error by admitting statements made by a co-conspirator that were not in furtherance of the conspiracy, that he was denied a fair trial, and that the district court improperly calculated his offense level pursuant to the federal sentencing guidelines. We affirm the decision of the district court.

I.

In May of 1990, a grand jury indicted Barry Cashin for engaging in a conspiracy to distribute marijuana, possession of marijuana with intent to distribute, simple possession of LSD, and for use of a firearm in relation to a drug offense.

During November of 1990, while incarcerated in Bay County, Michigan, on these charges, Barry devised a plan to intimidate certain individuals whom he believed would testify against him at trial regarding his participation in the marijuana distribution conspiracy. He approached his cellmate, Steven Zavorski, and asked him to hire someone to "go after" these potential witnesses. He obtained Zavorski's address at Jackson State Prison, where Zavorski was being transferred, so that Brian Cashin, Barry's brother, could send him payment for his "services." Zavorski subsequently contacted FBI Agent David Welker about the scheme and agreed to cooperate with federal authorities. Additionally, Barry asked another fellow inmate to arrange the removal of certain valuables from his residence in Midland, Michigan, to avoid their forfeiture. Some of these items were to be used to provide funds to advance Zavorski's efforts.

Not realizing that Zavorski was now a cooperating informant,

Brian paid Zavorski $450 for locating the witnesses sought by his brother and for hiring an "enforcer." This payment was made in the form of money orders sent to Zavorski in jail. He also personally paid $1,000 to the individual Zavorski ostensibly had hired to intimidate the witnesses, although that person was in fact Officer Michael Winters of the Michigan State Police. According to Zavorski, Brian was also to pay Zavorski's contact for purchasing dynamite, if necessary, for the purpose of killing FBI Agent Albert DiBrito, as requested by Barry.

On December 10, 1990, Barry Cashin pled guilty to the marijuana conspiracy charge pursuant to a plea agreement with the government. Two days later, Barry and Brian Cashin were each indicted on one count of conspiracy to engage in witness tampering (18 U.S.C. § 371 and 18 U.S.C. § 512(b)) and one count of witness tampering and aiding and abetting (18 U.S.C. § 1512(b) and 18 U.S.C. § 2). Barry was also indicted on one count of solicitation to commit a crime of violence (18 U.S.C. § 373). On March 28, 1991, the Cashins were found guilty of the conspiracy and witness tampering violations. A mistrial was declared in regard to the solicitation charge against Barry after the jury deadlocked.

II.

Both Barry and Brian contend that the district court abused its discretion in denying their motions for a new trial. The Cashins based their motions, in part, on the affidavits of Brian's wife, Deborah, which stated that she had contacted a juror in the case, Patricia McNally, by telephone the day after the verdict was rendered and had learned that another juror, Patricia White, had told McNally at some point during the trial that she knew Barry Cashin to be a "big time drug dealer in Midland for 15 years." (App. 63.) White had apparently indicated during *voir dire* that she

was not "acquainted" with either the Cashins or the particular facts of the case. (App. 326.) In a second affidavit given five days later, Deborah Cashin asserted that McNally also told her that "most jurors thought the Government's key witness, Steve Zavorski, was a liar but since Barry Cashin was a 'big time drug dealer' he must be a worse individual and, therefore, they chose not to believe Barry Cashin." (App. 31.) She also stated that McNally informed her that the jury reached a guilty verdict on the witness tampering count before McNally had even arrived to commence deliberations and, as a result, the jury verdict did not reflect her views.[1] Additionally, Deborah Cashin's affidavits contained allegations that trial delays resulted in members of the jury failing to recall critical evidence and that the trial judge's conduct conveyed to the jury the impression that Brian was guilty.

At a hearing held on the Cashins' new trial motions, they sought to subpoena McNally and White to answer questions related to Deborah Cashin's affidavits. The district court concluded, however, that the affidavits did not demonstrate that the jury had been exposed to "extraneous prejudicial information," as defined under Rule 606(b) of the Federal Rules of Evidence. As a result, the court refused to permit McNally and White to be subpoenaed to testify at the hearing. It found that, even assuming, *arguendo*, the allegation concerning White's knowledge was true, the location of Barry's house and his history of drug dealing were both established at trial. Consequently, the court concluded that the Cashins were not prejudiced such that a new trial was warranted.

Rule 606(b) of the Federal Rules of Evidence (Inquiry into validity of verdict or indictment) provides:

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1. Interestingly, each member of the jury, including McNally, affirmed the jury's verdict when polled. (App. 405-06).

Appendix A

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

There are a number of substantial policy considerations supporting the exclusion of juror evidence from post-trial proceedings, including the promotion of open deliberation, the stability and finality of verdicts, and the protection of jurors against annoyance and embarrassment. *See* Advisory Committee Notes to Fed. R. Evid. 606. As the Supreme Court explained in *McDonald v. Pless*, 238 U.S. 264 (1915):

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of

> discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation — to the destruction of all frankness and freedom of discussion and conference.

Id. at 26748. *See also Tanner v. United States*, 483 U.S. 107 (1987).

Accordingly, neither McNally nor White nor any of the other members of jury was free to give evidence in the hearing on the Cashins' motions for a new trial concerning the manner in which the jury reached its verdict or any feature of the deliberative process. Rule 606(b) excludes evidence related to "internal" influences upon the workings of a jury on competency grounds. This proscription was properly extended by the district court to testimony related to most of the allegations contained in Deborah Cashin's affidavits, including the jurors' reactions to trial delays, their beliefs about the trial judge's alleged biases, their recollection of the evidence, and the means by which they arrived at a guilty verdict on the witness tampering charge.

Rule 606(b) does provide a narrow exception for juror testimony related to "extraneous prejudicial information" or "outside influences." Fed. R. Evid. 606(b). The Cashins do not contend that any member of the jury was subject to threats, coercion, or other "influences" emanating from outside the jury. Arguably, however, knowledge on the part of White that Barry

Cashin "was a big time drug dealer" could be considered "extraneous prejudicial information" if White failed to disclose such knowledge during *voir dire*. The district court analyzed White's alleged awareness of Barry's activities in such a fashion. This was an incorrect reading of Rule 606(b). Where there is an indication that a juror

> had preconceived notions of liability or guilt or personal knowledge about the fact in issue, the statements may be admissible not because they are not prohibited by Rule 606(b), but as tending to prove that the juror lied on voir dire, a separate question from that of impeachment of verdicts.

Brofford v. Marshall, 751 F.2d 845, 853 (5th Cir. 1985) (quoting 3 Weinstein's Evidence § 606[04], at 606-33). It would have been within the discretion of the district court to subpoena White to have her testify regarding whether she deliberately or inadvertently misled counsel during *voir dire*. However, pursuant to Rule 606(b), neither White nor McNally could have been questioned regarding the impact that any undisclosed knowledge on White's part had on the jury's deliberations. *See Brofford*, 751 F.2d at 853.

A remand is not necessary in light of the district court's finding that White's alleged knowledge of Barry's history of drug dealing, if indeed she possessed such knowledge, was not prejudicial. The court pointed out that extensive evidence was introduced at trial related to Barry's drug-related activities and his residence in Midland.[2] It noted that none of this information

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2. Indeed, Barry Cashin freely admitted that at one time he had been "a big time drug dealer." (App. 122.)

pertained directly to Brian. With regard to Barry, as the jury acquitted him of solicitation to commit a crime of violence, the court concluded that it had not been "swept away by the current tide of drug war analogies and ratcheting penalties emanating from Washington and Lansing and elsewhere" in evaluating the evidence against him. (App. 415). We agree and hold that defendants' new trial motions were properly denied to the extent they were based on information contained in Deborah Cashin's affidavits.

In their new trial motions, the Cashins also alleged that they learned subsequent to trial that a government witness, Scott Poole, had received $1,000 from FBI Agent DiBrito following the conclusion of the trial. They asserted that the failure of Poole to disclose his alleged "expectation" of future payment denied the Cashins the ability to impugn Poole's credibility, thereby depriving them of a fair trial.

At the hearing on the Cashins' motions, the government proffered a memorandum written by Agent DiBrito approximately three weeks after the conclusion of defendants' trial. This memorandum confirmed that Poole was "never promised money, nor was it implied, for services rendered[.]" (App. 78). However, DiBrito suggested that a payment of $1,000 was appropriate as an "'award' versus payment for services." (*Id.*) Additionally, Marilyn Rosebush, the administrator of the Bay County jail, testified that Poole received the money on April 30, 1991, a month after the Cashins' trial. Based on this evidence, the district court found that the first suggestion of payment to Poole was made in DiBrito's memorandum. It also concluded that, at best, any information surrounding the payment was impeachment evidence which would not have resulted in the Cashins' acquittal.

We agree with the district court that, even if the Cashins established that Poole had been promised a reward before trial, such "newly-discovered evidence" would constitute nothing more than impeachment evidence and would not likely produce an acquittal upon retrial. *See United States v. Barlow,* 693 F.2d 954, 966 (6th Cir. 1982), *cert. denied,* 461 U.S. 945 (1983). Accordingly, the district court did not err in denying the Cashins' motions for a new trial to the extent that they were based on information related to Poole. As a result, their contention is without merit.

III.

The Cashins next contend that the district court erred in admitting into evidence portions of a conversation between them that was overheard by government witness Steven Zavorski during the course of the trial.

During a trial recess on March 14, 1991, Zavorski was taken to one of two adjoining holding cells in the court building. He was told that the Cashins would be brought up shortly and told not to initiate a conversation with them. While the Cashins were in the adjoining cell, Zavorski heard Brian tell Barry that he was "worried. He said: What if they can prove I know what the money was for." (App. 292). Apparently, Brian was concerned that the government would be able to demonstrate that he was fully aware that the payment he had made to Officer Winters was to be used to promote the witness tampering scheme. According to Zavorski, Barry replied that "[T]hey won't be able to prove it as long as you stick to the story that the money was for a private investigator." (App. 292.)

When informed about the government's intent to use

Zavorski's evidence, the district court held a hearing outside the presence of the jury to ascertain the circumstances under which Zavorski came to overhear the Cashins' statements. The evidence adduced at the hearing confirmed that Zavorski remained out of sight and did not announce his presence to the Cashins, and that they were not informed that Zavorski had been placed in the adjoining cell. The court considered and rejected the Cashins' arguments that the statements should be suppressed as violative of their Fourth Amendment privacy rights and their Sixth Amendment right to counsel. Brian Cashin presently reasserts his argument based on the Sixth Amendment; Barry Cashin does not. Neither defendant claims a Fourth Amendment violation in the instant appeal.

The Cashins also raised objections to Zavorski's testimony while he was on the stand. They argued that the statements attributed to them were hearsay and were not admissible as co-conspirator statements because they were made outside the scope of any conspiracy. *See* Fed. R. Evid. 801 (d)(2)(E). Their objections were overruled and the statements were admitted.

We first consider Brian's Sixth Amendment argument. He contends that, in light of *Massiah v. United States*, 377 U.S. 201 (1964), and *United States v. Henry*, 447 U.S. 264 (1986), the government deliberately and improperly elicited the statements at issue. He suggests that, by placing Zavorski in a cell next to him and his brother surreptitiously, the government created a situation in which the Cashins would be likely to make incriminating statements. Such a state of affairs, he asserts, was unconstitutional.

In *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), the Supreme Court observed that "*Henry* left open the question whether the Sixth Amendment forbids admission in evidence of an accused's

statements to a jailhouse informant who was 'placed in close proximity but [made] no effort to stimulate conversations about the crime charged.' " *Id.* at 456 (quoting *Henry*, 447 U.S. at 271 n.9). The Court had again reserved this question in *Maine v. Moulton*, 474 U.S. 159 (1985), cited by Brian Cashin in support of his argument.

In *Kuhlmann*, the Court found that the primary concern of the *Massiah-Henry* line of decisions "is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." 477 U.S. at 459. Where an informant — either through prior arrangement or voluntarily — merely happens to overhear incriminating remarks, the informant can hardly be considered to be engaging in " 'the functional equivalent of interrogation.' " *Kuhlmann*, 477 U.S. at 459 (quoting *Henry*, 447 U.S. at 277 (Powell, J. concurring)). In such circumstances, the government has not educed information from an accused after the right to counsel has attached. At most, the government has taken advantage of useful evidence that was freely, if artlessly, given.

Hence, in order to make out a Sixth Amendment violation related to Zavorski's testimony, Brian must demonstrate that "the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann*, 477 U.S. at 459. This he is unable to do. It is uncontroverted that the Cashins were entirely unaware of Zavorski's presence and did not engage in conversation with him. Zavorski did not initiate any contact with the Cashins whatsoever. While the government may have hoped that Zavorski would overhear and report any incriminating remarks made by the Cashins, his silent presence in the adjoining cell did not *elicit* any such remarks. We therefore reject Brian's argument.

As for the incriminating statements themselves, we are convinced that they did not constitute hearsay. Rule 801 (c) of the Federal Rules of Evidence defines "hearsay" to be "a statement . . . offered in evidence to prove the truth of the matter asserted." A "statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Fed. R. Evid. 801 (a). When these definitions are applied to the statements at issue, it is clear that the hearsay rule is not implicated. By introducing Brian's statement, the government was not attempting to show that he was actually "worried" that the government could prove that the payment to Officer Winters was part of a witness tampering scheme. Similarly, Barry's reply was not offered to show that, in fact, the government "would not be able to prove" that the payment was made for such a purpose if Brian stuck to his story. The significance of the statements was that they were made — not their content. Consequently, we find no error on the part of the district court.

IV.

Barry Cashin contends that the district court abused its discretion in refusing to subpoena all of the witnesses the defense requested to have testify at trial.

On the first day of trial, Barry filed an *ex parte* motion seeking to have 15 inmates and employees from the Bay County jail subpoenaed to testify at government expense. According to defense counsel, part of Barry's defense at trial would be that Steven Zavorski coerced him through his "size, demeanor and actions" into devising the witness intimidation scheme. (App. 224). When questioned by the court about the relevance of the requested witnesses to such a line of defense, counsel stated, "What I am doing through these witnesses is attacking [Zavorski's] truthfulness and credibility." (App. 228). The court determined

that it was not necessary to subpoena 15 witnesses to testify to the same general conclusory opinion about Zavorski's character and credibility. It allowed the defense to call two witnesses, whom counsel indicated would offer testimony specifically related to allegedly inconsistent statements made by Zavorski. It also allowed two additional witnesses to further support Barry's claim that he was coerced by Zavorski. Ultimately, the court permitted him to call six of his requested witnesses — five fellow inmates and a corrections officer.

Rule 17(b) of the Federal Rules of Criminal Procedure (Defendants Unable to Pay) provides in pertinent part:

> The court shall order at any time that a subpoena be issued for service on a named witness upon an *ex parte* application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense.

In making its determination of whether issuance of a subpoena is warranted, "the district court is vested with wide discretion." *United States v. Moore*, 917 F.2d 215, 230 (6th Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 1590 (1991). We will not reverse the district court's decision "unless the exceptional circumstances of the case indicate that defendant's right to a complete, fair and adequate trial is jeopardized." *Moore*, 917 F.2d at 230 (quoting *Terlikowski v. United States*, 379 F.2d 501, 508 (8th Cir. 1967), *cert. denied*, 399 U.S. 1008 (1968)). Accordingly, an indigent defendant must make a preliminary showing that a requested witness is "relevant, material and useful to an adequate defense." *Moore*, 917 F.2d at 230. We have adopted the following standard to ensure that necessary witnesses are in fact subpoenaed:

> [I]f the accused avers facts which, if true, would be *relevant* to any issue in the case, the requests for subpoenas must be granted, unless the averments are inherently unreliable on their face or unless the Government shows, either by introducing evidence or from matters already of record, that the averments are untrue or that the request is otherwise frivolous.

United States v. Barker, 553 F.2d 1013,1020 (6th Cir. 1977) (quoting *Greenwell v. United States,* 317 F.2d 108, 110 (D.C. Cir. 1963) (emphasis added)).

In the instant case, the defense averred that two witnesses had information pertaining to allegedly inconsistent statements on the part of Zavorski. The district court properly allowed these witnesses. With regard to the other 13 witnesses, the defense did not show that any of these witnesses could provide specific material information regarding Zavorski's behavior. From counsel's statements, the court determined that each of these individuals would likely offer evidence of "limited relevance" related to the character, demeanor, and credibility of Zavorski. (App. 392). After reviewing the record, we conclude that the district court did not abuse its discretion in refusing to allow all 15 of the requested witnesses to testify. Six witnesses were more than enough for Barry Cashin to adequately pursue his chosen line of defense. This is especially so in light of the jury's ability to assess Zavorski's credibility and demeanor on the stand. In the absence of a more detailed showing as to why the excluded witnesses were necessary, the district court could properly find that their likely testimony would be cumulative and legally irrelevant. *See* Fed. R. Evid. 403.

V.

Barry Cashin also contends that the district court abused its discretion in sentencing him to consecutive terms of imprisonment.

Barry argues that the two counts on which he was convicted were based on the same conduct without the requirement of any additional or distinct proofs at trial. As a result, he claims that he suffered a deprivation of his Fifth Amendment right against double jeopardy by receiving consecutive sentences.

One of the counts Barry was convicted on alleged violations of 18 U.S.C. § 371 and 18 U.S.C. § 512(b) (conspiracy to engage in witness tampering), while the other alleged violations of 18 U.S.C. § 2 and 18 U.S.C. § 1512(b) (witness tampering and aiding and abetting). It is elementary that, in most instances, conspiracy and the completed substantive offense are considered separate offenses for sentencing purposes. As the Supreme Court explained in *Iannelli v. United States*, 420 U.S. 770 (1975):

> Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act. Unlike some crimes that arise in a single transaction, the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act. Thus, it is well recognized that in most cases separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end. Indeed, the Court has even held that the conspiracy can be punished more harshly than the accomplishment of its purpose.

Id. at 777-78 (citations omitted). It is simply not the case that Barry's convictions were based upon the same evidence or were the result of the same transaction. *See Blockburger v. United States,* 284 U.S. 299 (1932) (when same act violates two statutes, the test of whether there are separate offenses is whether each requires proof of a fact which the other does not). In order to sustain the conspiracy charge, an agreement, which was not needed to support the substantive witness tampering charge, had to have been shown. Barry's contention accordingly lacks merit.

VI.

Brian Cashin contends that the district court erred in admitting into evidence statements by a co-conspirator that were not in furtherance of the conspiracy.

During the course of the trial, the government was permitted to introduce certain conversations between Barry Cashin and Steven Zavorski concerning the Cashins' witness intimidation scheme, Barry's attempt to arrange for the burglary of his residence, and the proposed killing of Agent DiBrito. Brian argues that this evidence was hearsay and that much of it did not fall within the exception provided in Rule 801 (d)(2)(E) of the Federal Rules of Evidence, because it was not in furtherance of the charged conspiracy to engage in witness tampering. Brian was not charged with solicitation to commit violence against Agent DiBrito.

Evidence was presented at trial that the charged conspiracy was bound up with both the burglary and the plot against Agent DiBrito, although Brian was not indicted in regard to the latter. The $1,000 that Brian paid to Officer Winters, whom the Cashins believed was an "enforcer," was earmarked both for witness tampering and for explosives intended for Agent DiBrito.

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According to Scott Poole, Brian was to receive a receipt and the key to a warehouse where the goods taken from Barry's residence would be stored. Proceeds from these items were to be used to partially cover the cost of intimidating witnesses.

As a consequence, the district court ruled that the Barry Cashin/Zavorski conversations were "intertwined sufficiently" with the charged conspiracy to permit their introduction against Brian. (App. 282). The court was careful, however, to give a limiting instruction in regard to the conversations:

> I'm just going to briefly restate to the jury what you heard in my instructions as well as in the opening comments of the attorneys that defendant Brian.Cashin to your left is not charged in the final indictment which relates to Special Agent Albert DiBrito and the claim there was a plot to harm or kill him. That charge is faced by defendant Barry Cashin only.
>
> Therefore, testimony from this witness [Zavorski] or any other witness that relates to the statements made about Special Agent DiBrito, you're going to have to separate those in your mind and consider those statements concerning DiBrito only as it relates to defendant Barry Cashin and consider the case against defendant Brian Cashin without those comments or the evidence that relates to DiBrito.

(App. 271). Furthermore, at the conclusion of the trial, the court gave an additional cautionary instruction:

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> Some of the evidence and a few items were admitted only to be considered by you for limited purposes, specifically here I'm referring to the testimony by Steven Zavorski that defendant Barry Cashin sought to have his home broken into and certain things stolen from it in order to avoid government seizure.
>
> You should consider this testimony — indeed, you are restricted in considering this testimony. That's admissible only as to defendant Barry Cashin and only as to deciding whether the government has proven the charges with respect to him. You may not consider it in any way against defendant Brian Cashin.

(App.397.)

Evidentiary rulings of a district court are reviewed under an abuse of discretion standard. *United States v. Curro,* 847 F.2d 325, 328 (6th Cir.), *cert denied,* 488 U.S. 843 (1988). The court handled the admission of the Barry Cashin/Zavorski conversations properly by making it clear to the jury that, as against Brian Cashin, they could only be used to consider his participation in the charged conspiracy. As a result, there is no question that those aspects of the conversations that were hearsay as defined by Fed. R. Evid. 801(c) were admissible under Fed. R. Evid. 801(d)(2)(E) as co-conspirator statements. We therefore reject Brian's contention.

VII.

Brian Cashin next contends that he was denied a fair trial as a result of trial delays as well as bias on the part of the district court.

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The record indicates that the jury was selected and the government made its opening statement on Monday, March 11, 1991. The trial was then continued to March 14, when the defense made its opening statement and the first witnesses were called. The trial progressed through Friday the 15th and was then continued to the following Monday, March 18. After evidence was heard through the 20th, the proceedings were delayed until March 26 because of a vacation the district judge had scheduled. The trial concluded and deliberations began on the 26th.

Brian asserts that the delay between the 20th and the 26th, in particular, severely hampered the jury's ability to remember the facts and to assess the evidence in the case. A district court's decisions on trial management are reviewed for abuse of discretion. *See, e.g., United States v. Goode,* 814 F.2d 13S3, 1354 (9th Cir. 1987); *United States v. Hershenow,* 680 F.2d 847, 858 (1st Cir. 1982). The court has broad discretion in determining the conduct and order of trial, to be limited only when a party's rights are prejudiced. *See, e.g., Brookhart v. Janis,* 384 U.S. 1 (1966) (holding denial of right to cross-examine witnesses is an abuse of discretion). We are convinced that the district court did not abuse its discretion in the instant case. When the trial resumed on the 26th, the district court, while encouraging the members of the jury to recall the evidence without refreshment, informed them that

> if there's anything particularly specific about evidence that you're just unable to recall, it's dimcult to ask the Court Reporter to dig through her notes and to read it back to you, but if it comes right down to that perhaps it would be possible.

(App. 399). In light of such an invitation to revisit the evidence, we fail to see how Brian was prejudiced by the six-day recess.

Brian also asserts that the district court exhibited bias against him during the course of the trial. He calls our attention to a laundry list of unfavorable rulings, mostly evidentiary in nature, which allegedly demonstrate the court's bias. A trial judge "remains under a duty to conduct the trial in an orderly fashion, to insure that the issues are not obscured and to act at all times with a view toward eliciting the truth." *United States v Tilton*, 714 F.2d 642, 644 (6th Cir. 1983). The record, however, does not reveal that the court's rulings were made in order to infiuence the verdict. The court was simply carrying out its duties with regard to the admissibility of evidence and as master of the trial. Accordingly, Brian's contention is without merit.

VIII.

Lastly, Brian Cashin contends that the district court improperly calculated his offense level pursuant to the federal sentencing guidelines.

Brian's presentence report prepared in advance of his sentencing calculated his base offense level at 30. This level was arrived at by taking Barry's adjusted offense level of 36 in his underlying drug case and subtracting 6 levels as directed by United States Sentencing Guidelines section 2X3.1 (Accessory After the Fact). Two levels were then added for obstruction of justice (U.S.S.G. § 3C1.1), as a result of the Cashins' apparent perjured testimony at trial. Based on this adjusted offense level of 32 and a criminal history category of 1, the probation department calculated Brian's sentencing range at between 121 and 151 months. After Brian objected to the presentence report, the district court tentatively adopted the calculation of the probation department but awarded Brian a two-point reduction as a minor participant, yielding an oflense level of 30 and a tentative guideline range of 97-121 months.

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At the sentencing hearing, Brian Cashin argued successfully that Barry's two-level upward adjustment for obstruction of justice in his underlying drug case should not be used in calculating his own oflense level. However, the district court found that the presence of numerous weapons at Barry's residence in close proximity to the drugs was reasonably foreseeable to Brian. The court set Brian's offense level at 28, yielding a guideline range of 78 to 97 months. He was sentenced to concurrent terms of imprisonment of 60 months for conspiracy to engage in witness tampering and 84 months for witness tampering.

Brian alleges that the two-level enhancement derived from Barry's possession of weapons and his own two-level enhancement for obstruction of justice were in error.

Section 2X3.1 of the guidelines provides that the base offense level for one who is convicted of being an accessory after the fact is "6 levels lower than the offense level for the *underlying offense.* . . . " (Emphasis added). Application Note 1 to section 2X3. 1 states in relevant part that:

> "Underlying offense" means the offense as to which the defendant is convicted of being an accessory. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant[.]

The "underlying offense" that is pertinent to Brian's sentencing is Barry's drug trafficking conviction. In accordance with the sentencing guidelines section 2D1.1(b), possession of a dangerous weapon is a specific offense characteristic of trafficking that requires a two-level increase in a defendant's base offense level.

Therefore, the only issue is whether Brian knew or reasonably should have known that Barry possessed a dangerous weapon in connection with his drug-related activities. The district court found that a number of weapons were present in Barry's residence, near a safe where drugs and money were stored. As a result, the court determined that Brian had the requisite knowledge to warrant an offense level increase. "We may not disturb the factual findings that underlie the district court's sentencing decisions unless such findings are clearly erroneous" *United States v. Moreno*, 899 F.2d 465, 470 (6th Cir. 1990) (citing *United States v. Perez*, 871 F.2d 45 (6th Cir. 1989)). The close relationship between the Cashins that was brought out at trial leads us to conclude that the district court did not commit error.

We also find that the district court did not err in imposing a two-level enhancement for obstruction of justice. Section 3C1.1 of the guidelines provides:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

Application Note 3(b) to section 3C1.1 states clearly that such an enhancement applies to "committing, suborning, or attempting to suborn perjury."

In the instant case, Steven Zavorski testified that he overheard Brian expressing concern that the government knew the payment to Officer Winters was intended to advance the witness intimidation scheme. Zavorski also heard Barry tell Brian to "stick

to his story" that he believed the payment was for a private investigator. At trial, Brian did in fact claim that he thought he was paying the $1,000 to a private investigator to locate one of the potential witnesses against his brother to get information on his "credibility." In light of Zavorski's evidence, the district court found that Brian Cashin testified untruthfully about a material fact. The court was therefore obligated by the provisions of section 3C1.1 of the guidelines to increase Brian's offense level and did so properly. *United States v. Alvarez*, 927 F.2d 300, 303 (6th Cir. 1991).

AFFIRMED.

ISSUED AS MANDATE: 5-03-93
COSTS: NONE
FILING FEE . . . . . $
PRINTING . . . . . $
TOTAL . . . . . $

APPENDIX B — MOTION FOR NEW TRIAL OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION DATED MAY 28, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Criminal No. 90-CR-20081-BC

UNITED STATES OF AMERICA,

Plaintiff

vs.

BRIAN CASHIN,

Defendant

MOTION FOR NEW TRIAL

NOW COMES the Defendant, Brian Cashin, by and through his attorney, Richard L. Lee, Jr. of SINCLAIR, MATHIEU & LEE, and makes his motion for a new trial in the above-entitled cause for the reasons set forth in the attached Affidavit of Deborah Cashin and further based upon the reasons contained in the accompanying brief.

Dated: May 28, 1991

s/ Richard L. Lee, Jr.
RICHARD L. LEE, JR. (P24253)
SINCLAIR, MATHIEU & LEE
Attorney for Defendant
200 E. Main Street
Midland, Michigan 48640
(517) 631-8104

APPENDIX B — AFFIDAVIT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION DATED MAY 20, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Criminal No. 90-CR-20081-BC

UNITED STATES OF AMERICA,

Plaintiff

vs.

BRIAN CASHIN,

Defendant

AFFIDAVIT

STATE OF MICHIGAN)
) ss.
COUNTY OF MIDLAND)

Affiant, Deborah Cashin, being first duly sworn, hereby states as follows:

1. That the Affiant is the wife of the Defendant, Brian Cashin, in this matter.

2. That after the Defendant, Brian Cashin, was convicted on Counts I and II the Affiant contacted the juror, Patricia McNally, by telephone to speak with her about this case.

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3. That during said telephone conversation juror McNally informed the Affiant of the following facts:

a. That a fellow juror, Patricia White, informed juror McNally that juror White knew where Barry Cashin lived and that Barry Cashin had been a "big time drug dealer" in Midland for 15 years. Juror McNally also informed the Affiant that during the jury deliberations most jurors thought the Government's key witness, Steve Zavorski, was a liar but since Barry Cash was a "big time drug dealer" he must be a worse individual and, therefore, they chose not to believe Barry Cashin.

b. That the two times that the trial was interrupted and the jury had days off affected the jurors memories of the witnesses' testimony and, therefore, the jury could not recall certain testimony of witnesses due to these days off during the trial.

c. That many jurors believed that the trial judge conveyed his belief to the jury that Brian Cashin was guilty of the charges for which he was indicted and that this was communicated to the jury by the manner in which the trial judge conducted the trial in this matter.

d. That the jury reached a verdict of guilty on Count II as it pertained to both Defendants in this matter on Thursday morning before juror McNally had even arrived to commence deliberations, contrary to the judge's instructions and, as such, Count II was not the verdict of juror McNally.

I declare that the statements above are true to the best of my information, knowledge and belief.

Appendix B

s/ Deborah Cashin
DEBORAH CASHIN

Subscribed and sworn before me this 20th day of May, 1991.
s/ Jeanette M. Maxwell
Jeanette M. Maxwell, Notary Public
Acting in Midland County, Michigan
My Commission Expires: 1/9/93

Prepared By:

s/ Richard L. Lee, Jr.
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Attorney for Defendant
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